Office - Supreme Court, U.S.
FILED
DEC 8 1981
ALEXANDER L. STEVAS

No. 81-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BECHTEL POWER CORPORATION, *Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA AND RAYMOND WILLIAMS, WILLIE McKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., ARIEL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD, AND FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL CONSTRUCTORS ASSOCIATION AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

This brief is submitted by the National Constructors Association as an amicus curiae pursuant to Rule 36 of this Court.

The National Constructors Association (herein NCA) is a non-profit, voluntary association composed of fifty-six

of the Nation's largest, unionized construction contractors.[1] NCA member companies design and construct industrial facilities throughout the United States and abroad. These facilities include nuclear and fossil fuel electric power plants, oil refineries, pipelines, chemical and petrochemical plants, mining and metallurgical facilities, paper mills, and many other industrial processing facilities.

NCA member companies perform their construction projects using union-represented labor. Typically, NCA member companies do not retain a permanent workforce of construction employees. Instead, on each project they employ skilled building trades workers in the project's geographic area under collective bargaining agreements with building trades international unions. Since the construction of a large industrial facility may require the employment of ten or more separate building crafts, it is not unusual for an NCA member to have at a single project, collective bargaining relationships with several building trades international unions.[2]

The collective bargaining agreements used by NCA members are varied and diverse. Some have been negotiated by the NCA on behalf of its member contractors. Others are negotiated by the individual NCA member company directly with the international union. The agreements may be multi or single craft, regional, local or national in scope.[3]

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[1] Petitioner Bechtel Power Corporation is a member of the National Constructors Association.

[2] During the 1970's roughly 40% of all construction workers were represented by sixteen trade unions, fifteen affiliated with the AFL-CIO, and the Teamsters. Office of Construction Industry Services, U.S. Department of Labor, *Annual Construction Report* at pp. 3-4 (April 1981).

[3] For example, the National Industrial Construction Agreement is a multi-craft, regional agreement between the NCA, on behalf of its member companies, the Teamsters and eight building trades international unions. This agreement covers NCA member com-

All collective bargaining agreements that have been negotiated by NCA obligate the signatory contractors to hire craft employees through local area hiring halls.[4] These

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panies' construction projects within a 15-state area in the South and Southwest. NCA member companies also frequently sign multi-craft "project" agreements with international unions and their subordinate local unions, covering construction of a single large project. While these contracts are binding on the locals, the locals may or may not be signatories. Most NCA members also are signatory to "National" agreements with one or more international unions. These agreements govern the employment of a specialized construction craft on the company's projects throughout the United States. For a description of the categories of collective bargaining agreements in the construction industry see generally, Labor-Management Services Administration, U.S. Department of Labor, *The Bargaining Structure in Construction: Problems and Prospects*, pp. 4-5 (1980).

[4] Since 1975, the following collective bargaining agreements, all of which contain hiring hall provisions, have been negotiated by NCA on behalf of its member companies:

National Industrial Construction Agreement with the Teamsters and eight building trades international unions

National Agreement with the International Brotherhood of Boilermakers

National Agreement with the United Brotherhood of Carpenters and Joiners of America

National Agreement with the International Association of Bridge, Structural and Ornamental Iron Workers

National Agreement with the Laborers International Union of North America

Tri-State Agreement with the Laborers International Union of North America

National Agreement with the Operative Plasterers and Cement Masons International Association

National Agreement with the Sheet Metal Workers International

National Agreement with the International Brotherhood of Teamsters

National Agreement with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada.

hiring halls are operated by the international unions' local union affiliates having jurisdiction of the geographic area containing the project site. Virtually all collective bargaining agreements negotiated independently by NCA members, whether project agreements, national agreements or local agreements, contain similar hiring hall provisions.

Under this system of doing business, it is not uncommon for a national contractor to use local hiring halls of several craft unions on each of its construction projects. Accordingly, the District Court's decision in this case, that liability for a discriminatorily operated hiring hall may be imposed on any employer using the hiring hall, is of vital interest and utmost concern to the NCA and its member companies.

SUMMARY OF ARGUMENT

The District Court's decision imposes automatic, *per se* liability on contractors using hiring halls for the acts of racial discrimination practiced solely by the union operators of the hiring halls. This liability attaches "whether or not the [contractors] knew or should have known [of the Union's discrimination]".

As a representative of national, unionized contractors, NCA submits that the District Court's decision should be reversed for several reasons. First, the Court's holding gravely endangers historic and essential construction industry employment practices and undermines important, long-standing federal policies encouraging these practices. Second, the District Court's holding that contractors can be held liable for the Union's unlawful hiring hall discrimination under principles of agency is incorrect because contractors have no control over union hiring halls. Also contractors' use of hiring halls is not consensual, but is compelled by strikes and union monopoly power over union labor. Third, it is unfair to impose liability upon con-

tractors, since they are powerless to prevent discrimination in hiring hall operations.

1. Congress and this Court have recognized that hiring halls have had a long and essential role in the construction industry. Federal policies encourage hiring halls because they fulfill specialized needs of the construction industry. Hiring halls permit the bidding and construction of large and geographically remote projects. They allow contractors to determine in advance of a project the availability and cost of labor. For employees, the hiring hall serves as a central location for employment and information.

The District Court's decision substantially impairs the ability of this federally sanctioned hiring hall system to function. Since national contractors may use several separate hiring halls on a project the lower Court's decision exposes them to multiple *per se* liability on each of their construction projects. The potential liability is staggering and can only result in contractor attempts to abandon or restructure the hiring hall system. These efforts undoubtedly will trigger labor-management discord, including strikes and, as government studies have shown, may cause severe injury to the affected contractors.

NCA does not suggest that these consequences outweigh the strong federal policies to erradicate racial discrimination in employment. NCA submits, however, that racial discrimination in hiring hall operations can and should be eliminated only by assessing liability against those responsible, *i.e.*, the unions that control the hiring halls and engage in the acts of discrimination. By correctly assessing liability, in this case only against Local 542, the unlawful discrimination will be remedied without disruption of valid and federally sanctioned construction industry practices and requirements.

2. The District Court's decision premised the contractors' liability for the Union's discrimination on the doctrine

of *Respondeat Superior*. However, the District Court misapplied the doctrine, reflecting the Court's misunderstanding of construction industry operations.

The principal's right to control the agent is fundamental to the existence of an agency relationship. However, it is well established that contractors lack any control over hiring hall operations.

Congressional debates concerning Title VII of the Civil Rights Act of 1964 reflect Congress' understanding that contractors could not control and, thus, could not be held responsible for, union hiring hall discrimination. Construction of the Civil Rights Act of 1866 should reach the same result.

An agency relationship also must be consensual. However, federal labor law approves the use of union strikes and coercion to compel contractors' acceptance of union hiring halls. Since federal policy sanctions the use of coercive tactics to achieve hiring halls, a consensual agency relationship cannot emerge from a contractor's use of the hiring hall.

3. The District Court's decision is manifestly unjust because it disregards the undisputed inability of contractors to learn of, or correct, discriminatory hiring hall referral policies. National contractors rarely negotiate collective bargaining agreements with the local unions which operate the hiring halls and thus cannot negotiate hiring hall antidiscrimination safeguards. Even if such negotiations occurred, contractors are, in many instances, powerless to secure such safeguards because their union agreements are prehire agreements. Unions have no legal obligation to negotiate or sign prehire agreements, let alone agree to contractor demands for hiring hall antidiscrimination safeguards.

Additionally, the nature of construction operations makes it virtually impossible for national contractors to learn

of the discriminatory operation of a hiring hall since those contractors have little opportunity to become acquainted with the referral practices of the local unions operating the hiring halls.

Finally, the inequity of saddling contractors with liability in these circumstances is even more egregious because NCA member contractors have no alternatives to the building trades unions and their hiring halls. Each craft union has a monopoly over the unionized workers in its particular trade, and contractors performing unionized construction must develop a collective bargaining relationship with each union and use its hiring hall to obtain workers in that trade.

ARGUMENT

I. The District Court's Opinion Undermines and Endangers Historic and Congressionally Sanctioned Employment Practices in the Construction Industry.

Under the District Court's holding, any contractor receiving a referral through a discriminatorily operated hiring hall is held strictly accountable for acts of racial discrimination practiced solely by the union operator of the hiring hall. The District Court's opinion imposes automatic, *per se* liability on a contractor simply "as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the [contractors] knew or should have known [of the Union's discrimination]" 469 F.Supp. at 401. Moreover, the contractor's liability exists irrespective of whether the Union's discrimination affected the contractor's employees or its referrals from the hiring hall.

The District Court conceded that "no case has been found which imposes civil rights liability on the employer . . . in these precise circumstances". *Id.* 469 F.Supp. at 401. Despite this paucity of support, the District Court assessed liability against a broad spectrum of non-culpable, un-

involved contractors. In so doing the District Court's decision gravely endangers historic and essential construction industry employment practices and undermines important, long-standing federal policies encouraging these practices.

Hiring halls have had a long and widespread existence in the construction industry.[5] Their utilization has been necessitated by the unique needs and operations of the construction industry.

Construction industry employment is sporadic and intermittent. Labor force requirements constantly change during the several phases of project construction as well as during interstices between projects. These variable work-force demands are fulfilled by union-operated hiring halls which provide a ready pool of skilled labor in the geographic area where the construction work is to be performed. Additionally, construction companies, by contacting the hiring halls, can determine the availability and cost of labor before estimating and bidding projects. The hiring hall thus serves a crucial function that permits the bidding and construction of large, and frequently geographically remote projects. See, Rains, *Construction Trades Hiring Halls*, 10 Lab. L.J. 363, 366-67 (June, 1959); Sherman, *Legal Status of the Building and Construction Trades Unions in the Hiring Process*, 47 Geo. L.J. 203 (1958).

Congress and this Court repeatedly have recognized the essential and special role of the hiring halls in the construction industry. In 1959, Congress, in recognition of the industry's special needs, carved out exceptions for the

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[5] Data collected by the Equal Employment Opportunity Commission shows that in 1969, approximately 1,500,000 workers in construction were employed in bargaining units where a hiring hall was utilized. This amounted to 59% of the nationwide total of union membership involved in construction. See, Hammerman, *Minority Workers in Construction Referral Unions Monthly Labor Review* at pp. 17, 19 (May 1972).

construction industry and construction industry hiring halls from several provisions of the National Labor Relations Act. The Senate Report accompanying the provisions of the Bill that were ultimately enacted commented:

> The problems of the building and construction industry under the Taft-Hartley Act have been the subject of considerable comment by authorities in the field; and Congress in previous years has made several attempts to correct the shortcomings of the act as applied to the industry. The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.
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> In the building and construction industry it is customary for employers to enter into collective-bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired.

S. Rep. No. 187 on S. 1555 86th Cong. 1st Sess. at pp. 27-28. See also, Rains, *Construction Trades Hiring Halls, supra* at 368.

This Court has also favorably commented on the essential role fulfilled by hiring halls in the construction industry:

> The [National Labor Relations] Board recognizes that the hiring hall came into being "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers." The hiring halls at times have been a useful adjunct to the closed shop. But Congress may have thought that it need not serve that cause, that in fact it has served well both labor and management—particularly in the maritime field and in the building and construction industry. In the latter, the contractor who frequently is a stranger to the area where the work is done requires a "central source" for his employment needs; and a man looking for a job finds in the hiring hall "at least a minimum guarantee of continued employment". (Footnotes omitted.)

Local 357, International Bro. of Team., etc. v. *NLRB,* 365 U.S. 667, 672-673 (1961). And, as this Court also observed, Congress made clear the view that hiring halls are useful:

> In order to make clear the real intention of Congress, it should be clearly stated that the hiring hall is not necessarily illegal. The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall . . .

Id. 365 U.S. at 673-674, citing S. Rep. No. 1827, 81st Cong. 2d Sess. at pp. 13-14.

As is shown by the foregoing, federal recognition of the hiring hall's efficacy is not confined to the benefits conferred on employers. Employees greatly benefit from the

hiring hall in several respects. Hiring halls serve as central locations where jobs and employment information are readily available to potential employees. Work applicants are not forced to expend time and money seeking out remotely located construction projects. Additionally, given the short term nature of construction employment, the constant source of employment available through hiring halls allows employees to line up jobs in advance and minimizes periods of unemployment. This, in turn, stems the drain on state unemployment insurance funds and lessens upward pressure on employer and state contributions to such funds. See Fenton, *Union Hiring Halls Under the Taft-Hartley Act*, 9 Lab.L.J. 505, 507 (1958); Bastress, *Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls*, 82 W.Va. Law Rev. 31, 47-48 (1979).

The District Court's decision, unless reversed, imperils this federally sanctioned hiring hall system. Since national contractors, such as NCA members, normally must use several separate hiring halls to perform each construction project, the District Court's opinion exposes them to multiple *per se* liability for each construction project. The immensity of the potential liability is staggering.[6] If the District Court's opinion is not reversed, this potential lia-

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[6] The District Court, apparently aware of the magnitude of the potential liability inherent in its holding, carefully explained several times that its liability findings were confined to injunctive rather than damage liability. Nevertheless, it is difficult to conceive of the absence of damage liability where there exists injunctive liability. In any event, even the imposition of injunctive liability could subject the contractors to immense financial burdens. For example, under the District Court's Order, contractors, such as Petitioner Bechtel Power Corporation, are obligated to initiate and operate training programs. The costs of such programs may be substantial. More significantly, since a national contractor's exposure to liability may extend to several hiring halls, the costs of training imposed by injunctive liability of the type ordered by the District Court in this case could be inordinate.

bility can lead only to attempts to abandon or restructure the hiring hall system by the affected contractors.

Efforts to substantially change the hiring hall system would not only adversely impact historic methods for the performance of construction, but it would collide, head on, with the strongly expressed federal solicitude for hiring halls. As one noted commentator has concluded, the substitution of individual hiring in place of the hiring hall system would produce "the most disastrous consequences" for the construction industry, including disorder and delay for contractors and employees, construction inefficiencies and impairment of job safety. Rains, *Construction Trades Hiring Halls, supra* at 369.

Allowing the District Court's decision to stand also would inevitably lead to contractor-union strife that is contrary to the federal policy of promoting stable collective bargaining relationships.[7] The origin of this conflict is not difficult to foresee. For the reasons previously stated, hiring halls have become embedded in the collective bargaining structure of the construction industry. Frequently, hiring halls were agreed to after long, bitter strikes. Accordingly, it can be safely forecast that contractor efforts to abandon or to initiate changes in the hiring hall system would be resisted, undoubtedly to the point of a strike, by the construction unions. See, *infra,* pp. 19-20. Plainly, the fomenting of strikes and the disruption of established construction industry practices is disfavored by federal labor policy. The sheer size and magnitude of the industrial projects constructed by NCA members greatly magnifies the coercive power inherent in the strike weapon. Moreover, the potential losses attributable to a strike on such a project make it indefensible to require a contractor to risk strikes in an effort to halt the union's self-generated discrimination.[8]

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[7] See Section 1 of the National Labor Relations Act as amended, 29 U.S.C. § 151.

[8] In 1980, NCA member companies performed domestic construction projects with an aggregate value of over 26 billion dollars.

The foregoing should not be construed as urging this Court to uphold the federal policies encouraging construction industry hiring halls at the expense of the strong federal policies to eradicate racial discrimination in employment. Rather, the Amicus submits that racial or other proscribed discrimination in hiring hall operations can only be terminated by assessing liability against those responsible—*i.e.*, the unions that control the hiring halls and engage in the acts of discrimination. That is precisely what the Civil Rights Act of 1866, as well as the Civil Rights Act of 1964, require.

The lower Court's decision that contractors are subject to vicarious liability for the Union's unlawful behavior, not only trespasses across the perimeters of that statutory scheme, but it produces the above described disruption of construction practices and unnecessarily injures the federally sanctioned hiring hall process. By correctly assessing liability, in this case against only Local 543, the unlawful discrimination will be remedied without disruption to valid construction industry practices and requirements.

The failure of the District Court to consider any of those matters requires this Court's reversal of the decision below.

II. The District Court's Application of Agency Principles to Establish Contractor Liability for the Union's Discrimination Is Clearly Erroneous.

The District Court premised the contractors' liability for the Union's discrimination on the doctrine of *Respondeat Superior*. However, the District Court has misapplied this doctrine in at least two respects. These errors reflect the Court's patent misunderstanding of construction industry operations.

The 1977 Census of Construction Industries reported that 474,943 firms performed construction valued at 213 billion dollars in 1977. *Annual Construction Industry Report*, April 1981, *supra*, p. 8.

Section 1 of the Restatement (Second) of Agency (1957) states:

> (1) Agency is a fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

The District Court's application of this principle to establish an agency relationship merely from a contractor's use of a union hiring hall is fundamentally wrong for at least two reasons. First, the contractor and union do not stand in the relation of principal to agent with reference to hiring hall operations because the union-operated hiring halls are not subject to the contractor's control; and, secondly, union resort to strikes and economic coercion to secure contractor use of the hiring hall eliminates the requisite consensual nature of the agency.

To begin with, the principal's right to control the agent is fundamental to the existence of an agency relationship. *NLRB* v. *Local No. 64, Falls Cities Dist. Council of Carpenters*, 497 F.2d 1335, 1336 (6th Cir. 1974). However, it is well established that contractors lack any control over union hiring hall operations. An exhaustive study by the Comptroller General of the United States into the failures of minorities to achieve opportunities in skilled construction crafts heavily emphasized this conclusion.[9] The Comptroller General's Report faulted federal efforts to extinguish discrimination in construction through approaches directed to construction contractors. Such efforts, the Comptroller General concluded, were doomed to failure because, unlike other union-employer situations, union construction em-

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[9] Comptroller General's Report To The Congress, *Federal Efforts To Increase Minority Opportunities in Skiled Construction Craft Unions Have Had Little Success* (Report HRD-79-13, General Accounting Office, March 15, 1979).

ployment is controlled by construction unions and not by the contractors. As the Comptroller General observed:

> OFCCP's approach to providing increased opportunities for minorities in the unionized skilled construction trades fails to adequately recognize that a union construction contractor is largely at the mercy of the unions as to whom it can hire. According to Federal construction contractors we interviewed, the construction craft unions with which they have collective bargaining agreements essentially determine whom the contractor can hire and, therefore, whether contract hiring goals will be met. The contractors thought it impractical to go outside their collective bargaining agreements to hire workers since there are few qualified minority construction workers outside of the unions. If a union does not have minority members to refer to a Federal contractor, the contractors do not believe they have the freedom to seek nonunion workers to meet the affirmative action obligations while the union has idle members. Contractors fear they risk a strike and other retaliatory action by the union.
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> Should a contractor hire a nonunion worker, collective bargaining agreements typically stipulate that the worker must obtain a work permit from the union in 8 days to continue working. (A work permit is a temporary right to work granted by a union to a nonmember which permits him to work in the union's jurisdiction for the duration of a project. A permit holder receives a journeyman's wage and must pay dues, but receives no other benefits of membership.) If the union refuses to issue a permit—for example, because it has idle members—the collective bargaining agreement usually prohibits the contractor from employing the individual beyond 8 days.

An OFCCP regional official said that OFCCP has authority to force contractors into compliance by requiring them to go outside their collective bargaining agreements to hire minority craftsmen. He added, however, that *such action is used sparingly because it could force a contractor out of business* since unions would refuse to bargain collectively in the future with a contractor that violated an existing agreement. Ac-

> cording to the official, *the region attempted to force contractor compliance three times and each resulted in harm to the parties concerned.* An example of union retaliation was a case in which union carpenters refused to work for a contractor as long as it employed a nonunion minority trainee hired pursuant to a State's affirmative action requirements. The union members' refusal to work effectively eliminated the contractor's access to carpenters.
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> We believe, therefore, that requiring contractors to go outside their union collective bargaining agreements is an impractical approach to increasing minority opportunities in construction craft unions. Although we recognize that contractors also can exert some pressure on unions to either admit minorities to journeyman ranks or issue them temporary work permits, we believe that, realistically, unions have the greater leverage in contractor hiring and that contractors are reluctant to violate their collective bargaining agreements.

Comptroller General's Report at pp. 24-25 (emphasis added). See also, *Id.* at pp. 13, 19-20.

An exhaustive study of the construction industry hiring hall system by the Department of Labor reached the identical conclusion. U.S. Department of Labor, *Exclusive Union Work Referral Systems in the Building Trades* at pp. 1-6 (1970). Another report, by an organization of construction service consumers, concluded that "Contractors who are dependent on the hiring hall have lost the right to hire or terminate their employees."[10]

Even more significantly, during the Congressional debate on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the precise issue raised by this case was

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[10] Task Force of the Construction Committee of the Business Roundtable, *Report on the Hiring Hall in the Construction Industry,* (1973), reprinted in Bureau of National Affairs, Construction Labor Reports No. 920 at p. E-1 (May 23, 1973).

the subject of a question from Senator Dirksen to Senator Clark, one of the Senate Floor Managers of the Bill. Recognizing the contractor's lack of control over the hiring hall, Senator Clark answered as follows:

> Question. If an employer obtains his employees from a union hiring hall through operation of his labor contract, is he in fact the true employer from the standpoint of discrimination because of race, color, religion, or national origin when he exercises no choice in their selection? If the hiring hall sends only white males, is the employer guilty of discrimination within the meaning of this title? If he is not, then further safeguards must be provided to protect him from endless prosecution under the authority of this title.
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> Answer. An employer who obtains his employees from a union hiring hall through operation of a labor contract is still an employer. If the hiring hall discriminates against Negroes, and sends him only whites, he is not guilty of discrimination—but the union hiring hall would be.

110 Cong. Rec. 7217.

Certainly, if the Congressional framers of Title VII did not intend that statute to extend liability to contractors for union hiring hall discrimination, such liability cannot be imposed under the guise of 42 U.S.C. § 1981.

The District Court's application of agency principles to saddle contractors with liability for the Union's illegal conduct ignores the reality of the unionized construction industry insofar as hiring hall control is concerned. Construction contractors simply exercise no control over the union hiring hall. Absent the right to control a union's operation of its hiring hall system, a contractor cannot be deemed the union's principal and cannot be held responsible for the union's unlawful hiring hall discrimination under agency principles.

The principal's right to control the agent's conduct is the essence of the agency relationship. Its absence, in

many varied settings, has precluded the imposition of liability against a purported principal.[11] Indeed, in *NLRB* v. *Local No. 64, Carpenters, supra*, 497 F.2d 1336, a case remarkably similar to this one, the absence of control over the methods and means of issuing work permits was the determinative factor in refusing to hold a Carpenters Local Union liable for the unlawful refusal to issue work permits by a Carpenters Union District Council. The Court reached this finding notwithstanding that the Local Union had created the District Council and delegated to it the Local Union's work permit duties.

The contractors' lack of control over the union hiring hall operations in this case mandates the same result.

The District Court's application of agency principles to hold the contractor liable for the acts of the union hiring hall also is erroneous for a second reason. It is union strikes or other coercive actions that compel contractors to accept the hiring hall. To be valid, an agency relationship must be consensual. Restatement (Second) of Agency § 15 (1957). See e.g., *Valley View Cattle Co.* v. *Iowa Beef Processors*, 548 F.2d 1219, 1221 (5th Cir. 1977), *cert. den.*, 434 U.S. 855 (1977).

It is well settled that hiring halls are mandatory subjects of bargaining. *Houston Chapter, Associated General Contractors of America, Inc.*, 143 NLRB 409 (1963), *enf'd sub nom., NLRB* v. *Associated General Contractors*, 349 F.2d 449 (5th Cir. 1965); *NLRB* v. *Tom Joyce Floors, Inc.*, 353 F.2d 768 (9th Cir. 1965). As such, the National Labor Relations Board has long held that unions lawfully may insist on or strike to obtain hiring hall clauses in their collective bargaining agreements. *National Union of Ma-*

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[11] See *e.g.*, Young v. Clear Lake Yacht Basin, Inc., 337 F. Supp. 1305, 1316 (S.D. Tex. 1972), aff'd, 473 F.2d 1389 (5th Cir. 1973), *cert. den.*, 414 U.S. 856 (1973); Globemaster Midwest, Inc. v. United States, 337 F. Supp. 465, 470-71 (Cust. Ct. 1971); Arnson v. General Motors Corp., 377 F. Supp. 209, 213 (N.D. Ohio 1974).

rine Cooks and Stewards (Pacific American Shipowners Association), 90 NLRB 1099 (1950).

The District Court found that Defendant Operating Engineers Local 542 conducted strikes of several weeks duration to compel employer acceptance of its hiring hall. Local 542's insistence on, and strike over, a hiring hall has many parallels among other craft unions. *See e.g., National Union of Marine Cooks and Stewards, supra; Houston Chapter, Associated General Contractors, supra.*

Where the federal labor policy expressly endorses a union's use of coercion, or threats of coercion, through strike activity to obtain employer agreement to hiring halls, the application of agency principles to assess liability against the employer for the operation of the hiring hall is patently improper because the use of the hiring hall is not voluntary. The hiring hall structure in the construction industry, therefore, contrasts sharply with employment agencies in other industries where the employer voluntarily selects the agency. The District Court's failure to consider and apply these differences fatally flaws its decision.

III. It Is Inequitable to Hold Contractors Responsible for Union Hiring Hall Discrimination Absent Contractors' Knowledge of and Ability to Prevent the Discriminatory Conduct.

The District Court's decision not only proceeds from erroneous legal premises, but it disregards the undisputed inability of the contractors to learn of, or correct, the Union's discriminatory referral policies. Saddling contractors with liability for acts they are powerless to prevent does not comport with the fundamental notions of equity and fair dealing upon which American jurisprudence rests.

As noted, national contractors enter national collective bargaining agreements with one or more building trades

international unions. These agreements provide that the national contractor will adopt on its projects many of the terms of the labor contracts negotiated by the international union's affiliated local union in the area. The adopted conditions universally include the obligation to use the local union's hiring hall.

As a general rule, the local unions neither negotiate nor sign National Agreements. Instead, the national contractor merely notifies the local union that the project will be performed under the terms of the National Agreement and requests employee referrals from the hiring hall. National contractors, thus, do not negotiate with the local unions concerning the establishment or operation of hiring halls or any other term or condition of employment. Hence, they are unable to negotiate antidiscrimination safeguards into the hiring hall operation.

Much more significantly, however, is the fact that the contractor is legally powerless to negotiate antidiscrimination safeguards even if it had the opportunity to bargain with the local unions about hiring hall operations. The contractor's collective bargaining agreements, in many instances, are prehire agreements since they necessarily antedate the start of construction and the hiring of employee complements. The National Labor Relations Board, with this Court's approval, holds that there is no statutory bargaining duty concerning prehire agreements in the construction industry. *R. J. Smith Construction Co.*, 191 N.L.R.B. 693 (1971), *enf. denied sub nom., Engineers Local 150* v. *N.L.R.B.*, 480 F.2d 1186 (D.C. Cir. 1973); *N.L.R.B.* v. *Local U. No. 103, Intern. Ass'n. etc.*, 434 U.S. 335 (1978).

The absence of a statutory bargaining duty means that the unions have no obligation to negotiate with a contractor about prehire agreements. This encompasses the right to refuse to participate in negotiations regarding the elimination or prohibition of discrimination in the operation of the unions' hiring halls. Indeed, it is the experience

of NCA members that building trades unions frequently offer contractors national labor contracts only on a "take it or leave it" basis. The proferred agreements universally include obligations to accept the local union hiring hall "as is" and the "take it or leave it" basis effectively precludes any contractor efforts to prevent or deal with discriminatory practices. The District Court completely disregarded these factors and its decision imposing liability on national contractors because of the union's discrimination in such circumstances is manifestly unjust.

Apart from these obstacles to a contractor's ability to ensure against union discrimination in the operation of the hiring halls, the very nature of construction operations makes it virtually impossible for a national contractor to learn of the discriminatory operation of a union hiring hall. Construction projects typically are of relatively short duration. A contractor's utilization of a particular craft and hiring hall may be limited to only a portion of the project. During this brief time span, the national contractor lacks any means of determining if discrimination infects the hiring hall apparatus. For example, a contractor could not evaluate whether a hiring hall was being operated in a discriminatory manner based on the number of minority referrals that it received. For, notwithstanding a discriminatorily operated hiring hall, a contractor could be referred an inordinate number of minorities.[12] Conversely, a nondiscriminatorily operated hiring hall could refer a totally white complement to contractor.

Nor can national contractors learn of hiring hall discriminatory practices in any other manner. National contractors are frequently strangers to the geographic areas of their projects. Their presence in the locale is transitory

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[12] This apparently occurred in this case since 50% of the referrals from Local 542's hiring hall to one contractor were minorities. See Bechtel Power Corporation Petition for a Writ of Certiorari, p. 17, n. 7.

and terminates when the project is completed. They rarely are members of the local employer association that negotiates the local collective bargaining agreements including the hiring hall provisions. These contractors, therefore, have neither the opportunity to discuss the operation of the hiring hall during negotiations, nor the time to learn of its operations through work experience in the locale. Rather, they are obligated to accept the hiring hall as they find it if they are to perform unionized construction in the area.

The inequity of fastening contractors with liability in these circumstances is even more egregious because NCA member contractors have no alternatives to the building trades unions and their hiring halls. Since each craft union has a monopoly over the unionized workers in its particular trade, a contractor performing unionized construction must develop a collective bargaining relationship and use the hiring hall to obtain workers in that trade. A contractor cannot, for example, obtain skilled pipefitters from the Ironworkers Union. Moreover, in many instances the unions, through their hiring halls, are the sole source of the large numbers of skilled tradesmen required to perform the construction of large industrial facilities. Additionally, some clients of NCA members require that their projects be built entirely with union labor thereby obligating the contractor to use the craft unions and their hiring halls.

The District Court's decision to disregard these matters and hold contractors accountable for the Union's hiring hall discrimination is patently unfair and must be remedied by this Court.

CONCLUSION

For the reasons stated herein, as well as those stated in the Petitioner's brief, the judgement of the Court below must be reversed.

Respectfully submitted,

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